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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
TY ERIK LOPES,  
  
Defendant and Appellant.

C041516  
  
(Super. Ct. No.  
SP080354B)

A jury convicted defendant Ty Erik Lopes of murder and rape, finding true the special circumstance that the murder occurred during the rape. Defendant was sentenced to life without parole. On appeal, defendant asserts the evidence was insufficient to support his conviction, the court erred in admitting evidence of uncharged acts and hearsay, and the court erred by not instructing the jury concerning perjury. We affirm the judgment, but remand for sentencing on the rape conviction.

## FACTS

On June 5, 2000, the body of 18-year-old Renee Ramos was found under a pile of insulation at the construction site of a Home Depot. Ramos's t-shirt was around her neck, her pants were pulled down to the middle of her thighs, and her underpants were partially pulled down. Although there were signs of manual strangulation, the cause of death was ligature strangulation. The marks on Ramos's body were consistent with someone strangling her with her bra and the beads she had been wearing around her neck. The autopsy report showed that Ramos died one to three days before her body was discovered -- between June 2 and June 4.

Analysis done on Ramos's blood returned a positive result for gamma-hydroxybutyrate (GHB), sometimes called the date rape drug, at a concentration of 65 milligrams per liter. GHB is known to cause drowsiness and lethargy to the point of unconsciousness. GHB is found naturally in everyone's blood without being ingested and exists in higher levels after death. Typical levels in a corpse average from 15 to 20 milligrams per liter, reaching 50 milligrams per liter in extreme cases. The criminalist who examined the blood could not determine whether the GHB was there naturally or whether Ramos had ingested it. There were no signs of alcohol or any other drug in Ramos's system.

Physical evidence collected from the crime scene included semen samples from Ramos's underpants and 16 hairs, some coming from Ramos's body and some from the insulation near the body.

The parties stipulated that testimony would show tests done on the semen excluded defendant as the source and showed Jacob Silva was the source. Only one of the hairs found at the scene was consistent with defendant's pubic hair, but it was not a match exclusive to defendant. One hair potentially matched Raymond Goans, a suspect who was not charged.

At trial, the prosecution presented this physical evidence along with the testimony of four key witnesses. The first, Josh B., was an eyewitness to the murder. The next two, Marcus Hopkins and Charles Cooper, were jailhouse informants who claimed defendant made incriminating statements to them. The last, Jesse Howlin, was called to provide propensity evidence.

Josh was born on August 1, 1985, and was 14 years old at the time of Ramos's murder. Josh knew defendant, Goans, and Silva (Ramos's boyfriend and a codefendant prior to severance) through skateboarding.

Josh testified that he was at a party in the Home Depot under construction around Memorial Day, 2000. Defendant, Silva, and Ramos were also present. At the party, Josh saw Silva and Ramos arguing. Silva struck Ramos a couple of times. After the first blow Ramos seemed dazed; after the second blow Ramos fell. Defendant was present, but did not participate in the argument. Josh testified that he left the party shortly after he saw Silva strike Ramos.

Sergeant Anthony Souza of the Manteca Police Department testified to interactions he had with Josh during the investigation into Ramos's death. After interviewing Josh on

September 7, 2000, Souza took Josh to the Home Depot where Ramos was killed. Although the building looked substantially different than the night Ramos was killed, Josh was able to lead detectives to a point about three feet from where the body had been found without any influence from the detectives. Josh also accurately described how the area looked and the state of Ramos's clothing when the body was discovered.

Prior to a second interview on September 18, 2000, Josh asked to visit Ramos's grave. After staring at the grave for a moment, Josh began to describe what happened at the Home Depot party. Josh said that defendant, Silva, and Goans were present and that defendant brought alcohol. Silva beat Ramos and dragged her from the back rooms to the spot where her body was found. There, Silva, defendant, and Goans had sexual intercourse with Ramos. At some point Silva choked Ramos with her bra. Then defendant choked her, holding her up like a hangman until she went limp. Defendant and Goans then moved the body a couple of feet and covered it.

Souza talked to Josh again on March 12, 2001. At that interview, Josh told Souza that Silva choked Ramos with his hands before beating her and that although Ramos only had one beer at the party, she was acting as if she had too much to drink.

When asked at trial about the inconsistencies between his trial testimony and what he told the police in the past, Josh said that he lied to the police on all those previous occasions. Josh admitted that at prior court appearances he was afraid of

getting hurt if he testified and that he lied to the police because he was afraid of bad consequences if he snitched. Josh also stated that defendant threatened him by telling him, "You're going down, punk."

Defendant elicited further inconsistencies in Josh's account of the incident, as well as several instances where Josh lied to investigators. A psychological evaluation of Josh concluded he had a lack of openness and a penchant for lying. Finally, Josh did not know what was perjury. When given its definition, he thought it was only a misdemeanor.

Hopkins met defendant when they were in jail together in April 2001. Hopkins was in jail after pleading guilty to four felonies. He was 33 years old and had a criminal past. Defendant began to confide in Hopkins while they were in jail in part because Hopkins stopped a group of inmates from beating up defendant.

Defendant told Hopkins that he, Silva, and Ramos had attended a party at a Home Depot that was under construction. Defendant brought beer and ecstasy to the party and someone gave Ramos the ecstasy. During the party Silva and Ramos had a fight. Defendant held Ramos's wrists down, thinking she and Silva were playing. When defendant realized Ramos was crying he let her go. Silva had been having sex with Ramos while defendant held her down. Defendant told Hopkins that the police would find DNA evidence from Silva and the "Norteno" on Ramos, but not from him.

Hopkins admitted to hearing jail guards talking about the case, but claimed he heard their conversations after he first talked to the police. He said that everyone in jail was talking about what happened in defendant's case. Hopkins also revealed that he had provided testimony in two other special circumstance murder cases. In exchange for his testimony, Hopkins had three felony counts dismissed. His sentence of four years ten months on the remaining counts he pled guilty to was stayed and he was released from jail. Furthermore, Hopkins's statement that he talked with defendant while they worked mornings together at the same job in the jail yard was shown to be untrue, as defendant never had a morning job.

Cooper met defendant in the San Joaquin County Jail. Cooper testified that defendant approached him saying that he had asked around, concluded that he could trust Cooper, and that he had to talk to someone about "it." Defendant told Cooper that he was in trouble with some inmates and needed help. Cooper testified he asked a couple of inmates to back off defendant.

Defendant later revealed that he was charged with Ramos's murder. Defendant admitted to having sex with Ramos, but claimed that "Ray" had killed her. Defendant claimed events got out of hand when Ramos started hollering that she was going to call the cops. When Cooper asked defendant if he killed her, defendant said "they" strangled her and "they" had to get rid of the evidence. Defendant told Cooper that Ramos was covered with asbestos or insulation, that they had put rags in her mouth and

strangled her but did not mean to kill her, and that the murder took place over Memorial Day weekend at a Home Depot that was under construction.

Cooper was in the San Joaquin County jail on warrants for charges of possession of precursors with intent to manufacture drugs and receiving stolen property, plus prior conviction enhancements. Cooper stated he was afraid that if he went to prison he would be killed. Cooper also had a lengthy record of felony and misdemeanor convictions dating to the 1970's and was on probation at the time of his testimony. In exchange for his testimony, Cooper was allowed to serve his time in Humboldt County, where he was placed in an alternative work program. After two days in that program, Cooper left. He remained at large until just before the trial, when he was arrested on a probation violation and sentenced to 30 days in jail. When arrested, Cooper gave several fake names and birth dates, apparently to avoid arrest on three outstanding felony warrants. Cooper also admitted he had provided information to the police to benefit himself a couple of times in the past.

Jesse was called to provide propensity evidence against defendant. Jesse was 17 years old when he testified. He knew Ramos, defendant, and Silva, and had seen Goans in the past but did not know him by name.

In early June 2000, after Ramos had been reported as missing, Jesse accompanied Silva when Silva got his hair colored and also spent time with Silva and defendant. One night, Jesse, Silva, and defendant went to pick up a girl who appeared to be

between 13 and 17 years old. They took her back to defendant's house, where defendant fondled her breasts and crotch. The girl told defendant to get away from her. When this happened, the girl was on the bed and defendant was on the floor in front of her. The girl had her clothes on at the time.

## DISCUSSION

### I

#### *Sufficiency of Evidence*

Defendant makes the dual argument that there is insufficient evidence to support his conviction and that the court erred in denying defendant's motion for acquittal pursuant to Penal Code section 1118.1. Because defendant admits that the "test to be applied by the trial court under [Penal Code section 1118.1] is the same test to be applied by an appellate court in reviewing a conviction," we can resolve both of defendant's contentions by determining whether sufficient evidence exists to support defendant's conviction.

"In assessing the sufficiency of the evidence, we review the *entire record* in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331, italics added; accord *Jackson v. Virginia* (1979) 443 U.S. 307, 318-320 [61 L.Ed.2d 560, 573-574]; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume every fact in support of the judgment that the trier could reasonably deduce from the evidence (*People v.*



*Kraft, supra*, 23 Cal.4th at p. 1053), and reversal is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin, supra*, at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"In reviewing the record, we do not reweigh the facts. We look for evidence "of ponderable legal significance . . . reasonable in nature, credible, and of solid value."" [Citations.] The testimony of one witness, unless it is physically impossible or inherently improbable, is sufficient to support a conviction." (*People v. Provencio* (1989) 210 Cal.App.3d 290, 306, italics added.)

Defendant argues that the inconsistencies in Josh's testimony, as well as the inconsistencies and contradictions in the jailhouse informants' testimony, makes the evidence they provide inherently incredible and therefore insufficient to support conviction. The sum of defendant's argument can be understood through defendant's argument on the credibility of Josh's preliminary hearing testimony: "The problem with trying to decipher what was truth and what was lie is that Josh changed his story more frequently than most people change their minds. Pinning him down is like trying to nail the proverbial Jello [sic] to the wall. Summarizing his preliminary hearing testimony does not inform the discussion here because when he says he 'lied' at the preliminary hearing, there is no way of knowing which of his various statements he is disavowing. Thus, his testimony in its entirety is inherently incredible."

Josh testified at trial that he only saw Silva beat Ramos and did not witness the murder. However, he had previously told the police he had witnessed the murder. He was able to point to where the body was discovered, describe the state of the clothing Ramos was wearing when her body was discovered, and provide a detailed description of the murder that was consistent with the physical evidence. The jury could easily find Josh's prior statement credible. Josh was able to recall the spot where the body was found after the Home Depot was completed. The structure looked substantially different than the night of the murder, which makes Josh's ability to find the spot Ramos was found important.

Furthermore, Josh's testimony that defendant, Silva, and Goans had sexual intercourse with Ramos before defendant strangled her to death was corroborated by physical evidence and the testimony of the jailhouse informants. Josh's testimony that Ramos was strangled with her own bra was consistent with the autopsy findings that the marks on Ramos's neck were consistent with ligature strangulation, either from her bra or her necklace. Josh's account was also consistent with Cooper's testimony that defendant had said "they" strangled Ramos at a Home Depot, that "they" had to get rid of the evidence, and that Ramos was covered with asbestos or insulation. Finally, Josh's testimony that defendant, Silva, and Goans had sexual intercourse with Ramos was corroborated by the hairs recovered from Ramos's body and, in part, by the semen found on her underpants, which was found to have come from Silva. This

testimony was also corroborated by Hopkins's testimony that defendant held Ramos down while Silva had sexual intercourse with her and Cooper's testimony that defendant had admitted having sex with Ramos but claimed that "Ray" killed her.

"The credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Provencio, supra*, 210 Cal.App.3d at p. 306; accord Evid. Code, § 312.) "'The mere fact that there are contradictions and inconsistencies in the testimony of a witness, or that the truth of his evidence is open to suspicion, does not render it inherently improbable within the meaning of the rule. It is for the jury to consider such inconsistencies and determine whether they were such as to justify the repudiation of the testimony of the witness in its entirety. The test is not whether the witness is truthful, but whether it can be said the testimony in support of the verdict is inherently untrue. . . . A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable, per se, must involve a claim that something has been done that it would not seem possible could be done under the circumstances described.'" (*People v. Fremont* (1941) 47 Cal.App.2d 341, 349, italics omitted.)

Defendant presents no argument that the testimony of how Ramos was killed, if believed by the jury, could not be the truth. Defendant's argument is likewise flawed in relation to the jailhouse informants' testimony, as no substantial argument is made that the testimony they provided, if believed, was

inherently improbable or physically impossible. Thus, defendant's argument that the evidence is insufficient to support conviction is based upon the assumption that we must reject the testimony of the witnesses entirely because they have lied. This argument fails because of the established principle that credibility is an issue exclusively for the jury. There is nothing inherently incredible about the witnesses' testimony that Silva, Goans, and defendant were at the Home Depot, that each man had sexual intercourse with Ramos after she had been beaten unconscious, and that defendant choked Ramos to death when they were done. (See *People v. Aubrey* (1967) 253 Cal.App.2d 912, 916 [allowing for credibility of part of witness statement when another part not credible].)

The jury could have believed Josh told the truth after seeing Ramos's grave or that the jailhouse informants were telling the truth. There was sufficient evidence for a rational trier of fact to reach that conclusion. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-320.) Defendant's argument is therefore without merit.

## II

### *Uncharged Acts Evidence*

Defendant argues that Jesse's testimony was improperly admitted pursuant to Evidence Code section 1108. Defendant contends the trial judge misunderstood the nature of the uncharged act and would have excluded the evidence under Evidence Code section 352 as unduly prejudicial if fully informed.

Evidence that the defendant committed an uncharged sexual offense is admissible in a prosecution accusing the defendant of a sexual offense if the evidence is not inadmissible pursuant to Evidence Code section 352. (Evid. Code, § 1108, subd. (a).) Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence" (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183), and the judge's ruling will be sustained on review unless it falls outside the bounds of reason. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

"When exercising its discretion under Evidence Code section 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) Balancing issues that arise under Evidence Code section 1108 require the judge to consider "such factors as the nature [of the uncharged offenses], relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less

prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

"[T]he probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense. [Citation.] . . . [T]he prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual conviction and a prison term . . . ." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917, italics in original.)

In reviewing the trial judge's decision to allow Jesse's testimony, we find nothing in the record to suggest that the ruling did not consider the relevant factors or that it came to a result that falls outside the bounds of reason. The trial court began to consider this issue early on in the trial. Defendant filed a written motion in limine to exclude Jesse's testimony. The trial court then heard oral arguments on the motion. The trial court postponed ruling on the motion until it could hold a hearing pursuant to Evidence Code section 402.

After Jesse testified at the section 402 hearing, defendant renewed his objection to the evidence, arguing that the uncharged offense was not relevant to the charged offense and that the testimony's probative value did not exceed its likely prejudicial effect. At this point in the proceedings, the

defendant, prosecutor, and trial court had discussed the nature of the uncharged offenses, relevance, and possible remoteness, the degree of certainty of its commission, its similarity to the charged offense, its likely prejudicial impact on the jurors, and the burden on the defendant in defending against the uncharged offense. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) Furthermore, the trial court was aware that the evidence was admissible under Evidence Code section 1108 as long as it passed the balancing test provided by Evidence Code section 352.

In ruling, the court stated that Jesse's testimony was probative because of the closeness in time between the charged and the uncharged acts and the similarity between the two. The court was also aware that the uncharged act did not result in a conviction. There is no suggestion in the record that the trial court did not take these factors into account when determining that the probative value of the evidence was not substantially outweighed by its prejudicial effect. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) As it appears the trial court took into account all relevant factors in making its decision, we conclude that the decision to admit Jesse's testimony was not outside the bounds of reason and therefore not an abuse of discretion.

Defendant asserts the trial court believed the uncharged act was a felony sexual battery (violation of Penal Code section 243.4, subdivision (a)) when it was really just a misdemeanor sexual battery (violation of Penal Code section 243.4,

subdivision (e)(1)) because defendant did not touch the girl's skin when he molested her. Also, the trial court instructed the jury concerning the elements of sexual battery but did not include as an element that the victim was restrained. Defendant argues: "Had the judge realized that the other offense was only a misdemeanor, it is reasonable to conclude that he would have exercised his discretion to exclude this prejudicially inflammatory evidence. It was simply too unreliable and too minor to have included in a case with charges as serious as those involved here and evidence as tenuous as involved here." We disagree that this establishes prejudicial error. The evidence was admissible as propensity evidence. In view of the strong evidence against defendant, any problems in the specific way it was presented to the jury was harmless. It is improbable that defendant would have obtained a more favorable result had the evidence been excluded or presented in a different manner. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

### III

#### *Hearsay Evidence*

Defendant next argues that the trial court erred by admitting hearsay evidence in the testimony of Robert Remlinger, defendant's pretrial attorney.

During the prosecutor's cross-examination of Remlinger, it was revealed that the public defender's office brings people with information about current cases to the prosecutor's office. The prosecutor then asked if that had occurred in this case and Remlinger replied that it had with respect to Hopkins. The



defendant raised a hearsay objection that the trial court overruled, determining there was no statement by Hopkins and that the testimony revealed only the fact that he had come forward. The prosecutor then asked whether an attorney from Remlinger's office had brought Hopkins to the prosecutor's office. Remlinger stated that he was not there when it happened but that it was his understanding that was what happened. The defendant objected to a lack of foundation. When the court inquired into the foundation of Remlinger's knowledge, Remlinger testified that his knowledge came from conversations with an associate in his office and court proceedings. The court then overruled the objection, stating: "It's not for truth of any statements. It's for the fact of how Mr. Hopkins was brought to your office."

Hearsay evidence is competent and relevant absent a specific hearsay objection. (*People v. Rodriguez* (1969) 274 Cal.App.2d 770, 776.) A judgment or decision based on the erroneous admission of evidence shall not be set aside unless the record shows a timely objection or motion to strike that specifically states the grounds for the objection or motion and the reviewing court concludes admitting the evidence was an error resulting in a miscarriage of justice. (Evid. Code, § 353.)

Defendant's first objection to the testimony relevant here was a hearsay objection and motion to strike the answer to the question asking if the public defender's office brought Hopkins's attention to the prosecutor's office. At this point,

there was no hearsay to which an objection could be lodged. The prosecutor had simply elicited that Remlinger had personal knowledge that the public defender sometimes referred witnesses to the prosecutor. The prosecutor only asked if Remlinger knew whether that happened with regard to Hopkins. There was no suggestion that an out-of-court statement was possibly being used for the truth of the matter asserted, and the court properly overruled the objection.

Defendant also objected to the next question, on grounds of a lack of foundation, which was: "Did an attorney then from your office bring Mr. Hopkins'[s] attention to my office?" This objection was proper, as there was no testimony regarding how Remlinger would know what happened in this particular instance. The trial judge then inquired into Remlinger's basis of knowledge and Remlinger replied that he had conversations with an associate in his office and had knowledge from court proceedings.

Any information Remlinger gained directly from observing the court proceedings would satisfy personal knowledge requirements and not be hearsay. Defendant, though, did not raise a hearsay objection to the testimony based on Remlinger's conversations with an associate in his office -- testimony that would properly be considered hearsay. "Failure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right to later complain of its erroneous admission into evidence. [Citation.] Parties also waive the right to later contest the admissibility of evidence where

counsel fails to state the specific, correct ground or grounds supporting the objection.” (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 865.) Therefore, defendant’s failure to object on hearsay grounds, after testimony revealed the witness’s knowledge may have been based on hearsay, waived the issue on appeal.

Even considering the merits of defendant’s claim, we find no reason to overturn the judgment. Although a portion of the testimony may have been based on hearsay, any error in admitting the evidence was harmless beyond a reasonable doubt.

Defendant argues that by allowing Remlinger to testify about this matter the prosecutor improperly bolstered the credibility of Hopkins because the jury would infer that the public defender’s office would not have provided Hopkins to the prosecutor if it did not believe him. Hopkins’s testimony was substantially corroborated by the testimony of Josh and Cooper. The possibility that the jury may have concluded that Hopkins was truthful, because the public defender’s office referred him to the prosecutor’s office, is too remote to warrant the inference of prejudice that defendant suggests. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1270 [tangential evidence harmless].) Given the preceding questions asked to Remlinger, it is more likely that the jury would infer that Hopkins was referred according to the standard policy of the public defender’s office than because the information he had was deemed credible. In addition, the testimony is tangential to the main issues at trial. It does not imply defendant’s guilt nor does

it suggest the public defender's office believed Hopkins.

"Assuming error, it was clearly harmless and did not result in a miscarriage of justice." (*Ibid.*)

Furthermore, the evidence of defendant's guilt was strong. It included the testimony of Josh, Cooper, and the investigating officers, as well as physical evidence linking defendant to the crime. "Under the circumstances, it is not reasonably probable that the jury would have reached a more favorable verdict but for the admission of the foregoing testimony from the witness . . . . Accordingly, any error in admitting it was clearly harmless." (*People v. Jackson* (1980) 28 Cal.3d 264, 307, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

#### IV

##### *Jury Instruction on Perjury*

Finally, defendant claims the trial court erred when it refused to give the jury instructions on the crime of perjury. We disagree.

Defendant requested the court to instruct the jury that a person who falsely testifies after taking an oath is guilty of perjury. Defendant also requested that the instruction be modified to relate to Josh's testimony, so that the jury would know it could reject his testimony if it wished. Ultimately, the trial court did not accept defendant's request to instruct on perjury. Instead, the trial court provided the standard instructions relating to a witness's testimony, including CALJIC Nos. 2.13 (prior consistent or inconsistent statements), 2.20

(believability of witness), 2.21.1 (discrepancies in testimony), 2.21.2 (witness willfully false), 2.22 (weighing conflicting testimony), 2.23 (believability -- prior felony), 2.23.1 (believability -- prior misdemeanor), 2.24 (believability -- character for honesty), and 2.27 (sufficiency of testimony of one witness).

Defendant claims that he requested a "pinpoint" instruction and that it "[was] error to refuse to give an instruction which 'directs attention to evidence from . . . which a reasonable doubt of guilt could be engendered.'" (*People v. Hall* (1980) 28 Cal.3d 143, 159.)

We first note that defendant's argument has not been waived simply because the record does not show the words pinpoint instruction or an explanation as to why perjury related to the defense theory. "The defendant had requested a particular instruction, and the trial court had denied that request. Nothing further is necessary to preserve the issue for appellate review." (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465.) However, we conclude the trial court did not err in refusing to instruct as the defendant requested.

The instruction proposed by defendant was designed to provide the jury with a reason to reject all or part of Josh's testimony. However, the standard instructions used by the court already made this point clear to the jury. CALJIC No. 2.20 provided the jury with several factors to consider when giving credence to a witness's testimony. CALJIC No. 2.21.2 instructed the jury that a witness, willfully false in a material part of

his or her testimony, is to be distrusted, and that the jury could reject the whole of that testimony. CALJIC No. 2.24 gave the jury the ability to discredit a witness's testimony because of a character for dishonesty. The only difference between the import of these instructions and that requested by defendant is the use of the word perjury. "Because defendant's proposed instructions would merely have elaborated on these general instructions, the trial court's refusal to give them was not error." (*People v. Hayes* (1990) 52 Cal.3d 577, 626.)

The defendant's theory of the case was not affected by the trial court's refusal to instruct on the elements of perjury. If Josh had been willfully false in his testimony, which he must necessarily be to commit perjury, CALJIC No. 2.21.2 properly allowed defendant to argue that all of Josh's testimony should be disbelieved. Defendant's proposed instruction would only elaborate on CALJIC No. 2.21.2 by adding the word perjury into the jury's thought process. Therefore, the trial court's decision not to instruct as defendant requested was proper.

V

#### *Sentencing on Rape Conviction*

Although the parties did not raise the issue on appeal, the record does not reflect that defendant was sentenced on the rape conviction. (See Pen. Code, § 12 [duty of court to impose sentence].) Therefore, we must remand for the trial court to perform its duty.

DISPOSITION

The judgment is affirmed. We remand to the trial court for the limited purpose of sentencing on the rape conviction and preparing and transmitting to the Department of Corrections an amended abstract of judgment.

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NICHOLSON, J.

We concur:

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SCOTLAND, P.J.

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ROBIE, J.